UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA

LeMond Cycling, Inc., Plaintiff, v. Trek Bicycle Corporation, Defendant/Third-Party Plaintiff, v. Greg LeMond, Third-Party Defendant.	Civil No. 08-1010 (RHK-JSM) Judge Richard H. Kyle Magistrate Judge Janie S. Mayeron Date: September 10, 2009 Time: 11:00 a.m. Judge: Janie S. Mayeron

PLAINTIFF'S OPPOSITION TO TREK'S MOTION TO COMPEL
ANDREU TAPE RECORDING

Trek's Motion to Compel should be denied. Trek has not even attempted to show a need for production of the recorded conversation between Greg LeMond, Betsy Andreu, and LeMond's licensing attorney Sidney Bluming, much less achieved the required showing of "substantial need" and "undue hardship." Instead Trek argues that the recording was either not work product or was waived for one of three reasons: (1) the recording was surreptitious; (2) Trek believes it to be a "verbatim non-party witness statement"; and (3) Plaintiff submitted an affidavit by Betsy Andreu in support of its summary judgment motion. As detailed below, each of these arguments fails. Furthermore, Plaintiff remains

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willing – as it has been since April – to submit the recording for an *in camera* review so that this Court can determine the appropriate level of protection.

BACKGROUND

The issue of the Andreu recording was discussed at the January 15, 2009 discovery hearing where Plaintiff explained the origin of the recording as well as the participants to Trek's counsel. Seemingly satisfied by Plaintiff's explanation of its work product claim, Trek did not raise any further questions about the recording until over three months later in its April 24, 2009 letter to Plaintiff's counsel, in which Trek made an unexpected request for production of the recording. (*See* 4/24/2009 Stippich letter to Robbins and Bruce, at Robbins Decl. Ex. 1.)

In response, Plaintiff reiterated its claim of work product protection, but agreed to review of the recording to determine whether Plaintiff "might be amenable to either producing it upon an acceptable agreement as to their being no broader waiver of privilege or submitting it for in camera review" by this Court. (*See* 4/28/2009 Robbins letter to Stippich, at Robbins Decl. Ex. 2.)

Rather than wait the requested three days for Plaintiff to conduct the review and communicate its decision, Trek reiterated its request the following day, citing deposition testimony of Kathy LeMond. (*See* 4/29/2009 Stippich letter to Robbins, at Robbins Decl. Ex. 3.) Plaintiff responded, explaining that Ms. LeMond's testimony was irrelevant to the question of whether Bluming was indeed on the phone call between Andreu and Mr. LeMond. (*See* 4/30/2009

Robbins letter to Stippich, at Robbins Decl. Ex. 4.) After the confirmatory review of the recording, Plaintiff served a revised privilege log that provided more specificity for the entry related to the Andreu recording. (*See id.*; 5/11/2009 Robbins letter at Stippich Decl. Ex. 3 (Doc. No. 152-3).)

After over a month, during which time Plaintiff believed it had satisfied Trek's request for information about the Andreu recording, Trek asked whether Plaintiff would "continue to object to the production of the tape." (*See* 6/29/2009 Weber letter to Rahne, at Robbins Decl. Ex. 5.) During a subsequent meet and confer, Plaintiff agreed to conduct further investigation into the date of the recording. (*See* July 6 and July 8, 2009 correspondence, at Robbins Decl. Ex. 6.) Pursuant to Trek's request, Plaintiff did conduct an additional investigation into the date of the recording, and was able to further narrow it down to the year 2004, which Plaintiff provided in a revised privilege log on July 15, 2009. (*See* Robbins Decl. Ex. 7.)

Now, nearly two months after Plaintiff provided the additional information that *Trek* requested – two months that Trek has remained *completely* silent on the issue of the recording, allowing Plaintiff to, again, believe that an agreement had been reached – Trek filed the instant Motion to Compel. In filing this Motion, Trek has failed to abide by its Local Rule 37.1 meet and confer obligations, apparently preferring to spring this Motion on Plaintiff without engaging in a good faith attempt to work out any remaining dispute. Trek's decision is especially unfortunate since this is an issue that Plaintiff has already demonstrated a willingness to resolve. For instance, Plaintiff not only revised its privilege log pursuant to Trek's requests, it also expressly offered to submit the recording for an *in camera* inspection by this Court. An offer that remains in effect today.

ARGUMENT

The work product doctrine provides for the protection of two types of documents and tangible things: (1) ordinary work product includes items such as photographs and raw information, and is discoverable "only upon a showing of 'substantial need and an inability to secure the substantial equivalent of the items through alternate means without undue hardship'"; and (2) opinion work product which contains mental impressions, conclusions, opinions, or legal theories regarding the litigation, and is only discoverable in "rare and extraordinary circumstances." *Pittman v. Frazer*, 129 F.3d 983, 988 (8th Cir. 1997) (quoting *In re Murphy*, 560 F.2d 326, 333-36 & n.20 (8th Cir. 1977) (affirming denial of motion to compel discovery of investigator's file where portions of the file had been disclosed, and holding that waiver of work product protection applied only to photographs that had been disclosed).

I. The Recording is Protected by the Work Product Doctrine and Trek Has Failed to Show Substantial Need or Undue Hardship to Overcome the Protection.

Because the Andreu recording provides explicit details of LeMond's licensing attorney's legal opinions and legal strategies, portions of the Andreu recording qualify as opinion work product, while other portions qualify for ordinary work product. *See In re Grand Jury Subpoena Dated July 6, 2005,* 510

F.3d 180, 184 (2d Cir. 2007) (holding that surreptitiously recorded conversations were considered ordinary work product, and acknowledging that at least parts of the recordings could have been opinion work product had the recordings been submitted for *in camera* review).

Trek argues that the recording falls under the rulings from *Schipp v. Gen. Motors Corp.*, 457 F. Supp. 2d 917 (E.D. Ark. 2006) and *Dobbs v. Lamonts Apparel, Inc.*, 155 F.R.D. 650 (D. Alaska 1994). (*See* Trek Mem. at 6.) In *Schipp*, the court held that while the attorney's notes and thoughts were protected, "any verbatim non-party witness statements are neither privileged nor work product and must be produced." *Id.* at 924; *see also Dobbs*, 155 F.R.D. at 653. However, the Andreu recording is not merely a "verbatim non-party witness statement." It does not relate to the Andreu affidavit submitted in support of summary judgment, and it is not merely a verbatim statement in any case. First, it is not simply a response to a static questionnaire, but is instead an active conversation in which Bluming's questions show his legal thought processes. Second, it includes an explanation by Bluming of his legal opinions and legal strategy.

Trek has failed to show any need for the recording and, therefore, has not overcome the work product protection. *See United States v. Miracle Recreation Equip. Co.*, 118 F.R.D. 100, 108 (S.D. Iowa 1987) (holding that tape recordings of discussions between Consumer Product Safety Commission and its attorneys were protected work product, even though defendant had substantial need for the information); *see also Bradley v. Wal-Mart Stores, Inc.*, 196 F.R.D. 557 (E.D. Mo.

2000) (denying motion to compel surveillance tapes on the basis of work product protection where plaintiff failed to show substantial need).

II. LeMond Did Not Waive Work Product Protection by Recording the Conversation.

As noted above, the act of recording the conversation between Bluming, LeMond, and Andreu, did not waive the work product protection. *See In re Grand Jury Subpoena Dated July 6, 2005*, 510 F.3d at 184 (2d Cir. 2007) (holding that surreptitiously recorded conversations were considered ordinary work product); *Miracle Recreation Equip. Co.*, 118 F.R.D. at 108; *Bradley*, 196 F.R.D. 557.

Additionally, in *Reed v. Cedar County*, No. C05-0064, 2006 WL 2246414, *3 (N.D. Iowa Aug. 4, 2006) (attached at Robbins Decl. Ex. 8), the plaintiff claimed work product protection for the "transcript of a surreptitious tape recording of a conversation between the plaintiff and defendant." The court rejected the defendant's argument that plaintiff's production of other surreptitious tape recordings resulted in a waiver of work product protection. *Id.* Furthermore, the "surreptitious" nature of the recordings was not even considered in the court's analysis. Rather, the court ordered production of the recording because "a party need not demonstrate substantial need or undue hardship in order to obtain a 'statement concerning the action or its subject matter previously made by that party.'" *Id.* The recording at issue here is not related to a statement made by Trek. It is not even related to the Andreu affidavit that was submitted in support of Plaintiff's summary judgment motion. Therefore, Trek must show substantial need or undue hardship to obtain the recording – whether the recording was surreptitiously made or not – a showing that Trek has not even attempted to make.

III. Plaintiff's Use of the Andreu Affidavit Did Not Waive Work Product Protection.

Trek's reliance on *Nobles, Kallas*, and *Versatile Metals* is misplaced. The report at issue in *Nobles* was not only used for impeachment purposes during trial, it had also already been examined *in camera* such that "all reference to matters not relevant to the precise statements at issue" were excised by the court. *United States v. Nobles,* 422 U.S. 225, 228-29 (1975). In fact, the exact wording in *Nobles* is that when "respondent's counsel stated that he did not intend to produce the [investigator's] report, the court ruled that the investigator would not be allowed to testify *about his interviews with the witnesses*." *Id.* at 228 (emphasis added). Similarly, the courts in *Kallas* and *Versatile Metals* decided in favor of production of protected materials based on the plaintiff's "[t]estimonial use of work product." *Kallas v. Carnival Corp.*, No. 06-20115-CIV, 2008 WL 2222152, at *4-5 (S.D. Fla. May 27, 2008) (attached to Robbins Decl at Ex. 9); *Versatile Metals, Inc. v. Union Corp.*, Civ. A. No. 85-4085, 1987 WL 11229, *2-3 (E.D. Pa. May 22, 1987) (attached to Robbins Decl. at Ex. 10).

Unlike in *Nobles, Kallas*, and *Versatile Metals* where testimony was directly related to the substance of the work product at issue, here Plaintiff has never attempted to use the Andreu recording for testimonial purposes, and the substance of the Andreu affidavit is completely unrelated to the substance of the recording. The substance is so different, in fact, that if the recording were edited *in camera* so that "all reference to matters not relevant to the precise statements at issue" were excised, there would be no portion of the recording remaining to produce to Trek. *Versatile Metals*, is especially distinguishable since that case involved partial production of a witness statement. 1987 WL 11229, at *1-2. In contrast, the Andreu affidavit – the only item being used for testimonial purposes – was produced in its entirety.

CONCLUSION

For the reasons stated above, Trek's Motion to Compel should be denied. However, as Plaintiff informed Trek back in April 2009, Plaintiff remains willing to submit the recording to the Court for *in camera* inspection.

Dated: September 1, 2009

ROBINS, KAPLAN, MILLER & CIRESI L.L.P

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